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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MICHAEL PEÑA et al., Plaintiffs and Appellants, v. J&M ASSOCIATES, INC., et al., Defendants and Respondents.	D051782 (Super. Ct. No. GIC833973)

APPEALS from a judgment and postjudgment order of the Superior Court of San Diego County, Richard E.L. Strauss, Judge. Affirmed.

Michael Peña, plaintiff and class representative in his class action for unpaid wages, appeals a judgment entered in favor of defendant National Steel and Shipbuilding Company (NASSCO) and a postjudgment order denying his Code of Civil Procedure[1] section 473, subdivision (b), motion to vacate a summary judgment entered in favor of defendant J & M Associates, Inc. (J&M). On appeal, Peña contends the trial court erred

1 All statutory references are to the Code of Civil Procedure unless otherwise specified.

by: (1) granting summary judgment for NASSCO because there are triable issues of material fact whether NASSCO was a joint employer of the represented class of J&M employees who were not paid for attending a one-day safety training course; and (2) denying his section 473, subdivision (b), motion to vacate the summary judgment for J&M.

FACTUAL AND PROCEDURAL BACKGROUND

NASSCO operates a large construction and repair shipyard. To obtain additional skilled labor on a temporary basis to meet its production needs, NASSCO occasionally contracts with temporary labor providers that recruit and hire temporary workers. Since 2001, J&M, a labor contractor, has provided temporary workers to NASSCO in return for compensation based on the number of hours worked by J&M employees and the hourly rate set forth in its contract with NASSCO. On or about February 19, 2004, J&M recruited and hired Peña, then a resident of Mesa, Arizona, to work as one of its temporary employees on NASSCO projects in San Diego.

To ensure the safety of individuals inside NASSCO's shipyard, almost all workers, before performing work at NASSCO's shipyard, must attend a one-day safety training course covering general safety topics, including shipyard hazards, fire safety, and OSHA requirements. The safety training course is presented by NASSCO representatives. J&M coordinators are responsible for ensuring J&M employees attend the safety training course before beginning work at NASSCO. J&M coordinators generally escort their employees to the course and pick them up on its conclusion. On February 20, J&M's coordinator directed Peña to attend the NASSCO safety training course. After the

training course, Peña was escorted by a J&M coordinator to the NASSCO pipe shop at which he was told when and where to report for work the following day. The following day (February 21), Peña reported to NASSCO with his tools and began working. Peña was employed by J&M until April 8, 2004.

In August 2004 Peña filed the instant action against J&M and NASSCO alleging causes of action for wrongful termination in violation of public policy, various Labor Code violations, and intentional infliction of emotional distress. After his wrongful termination claim was settled and after various amendments to the complaint, Peña filed the operative sixth amended complaint alleging unpaid wages and various other Labor Code violations and violation of the unfair competition law (Bus. & Prof. Code, §§ 17200 et seq.). He also sought an order certifying those claims as a class action and appointing him as representative of the class of " '[a]ll persons hired by [J&M] to perform work for NASSCO within the State of California who have undergone NASSCO's mandatory safety orientation or training and were not paid for the time spent in that safety orientation or training.' " The trial court subsequently granted Peña's request for class certification. [2]

J&M's Motion for Summary Judgment. On October 4, 2006, J&M filed a motion for summary judgment. The hearing date for its motion was set for January 19, 2007. On January 10, Peña's counsel appeared ex parte to request a continuance of the hearing.

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2 On January 12, 2007, the trial court granted Peña's request for class certification, implicitly adopting Peña's requested definition of the represented class. Accordingly, for purposes of this opinion, we presume the represented class is defined as quoted above.

The trial court denied that request. On January 11, Peña filed his opposition to J&M's motion for summary judgment. At the January 19 hearing on J&M's motion for summary judgment, the trial court did not consider Peña's opposition papers because they were untimely filed, noting the opposition papers were required to be filed 14 days before the hearing pursuant to section 437c, subdivision (b)(2). The court then granted J&M's motion for summary judgment and entered judgment in its &M's favor.

On March 8, Peña filed a section 473, subdivision (b), motion to vacate the summary judgment for J&M. He attached a declaration of his counsel, Marcus Jackson, in which Jackson stated he mistakenly and inadvertently filed untimely papers requesting a continuance of the hearing on J&M's summary judgment motion and untimely filed Peña's opposition to that motion. J&M opposed Peña's section 473, subdivision (b), motion, arguing that section 473, subdivision (b)'s mandatory relief provisions are inapplicable to mistakes involving summary judgment proceedings. On May 4, the trial court denied Peña's section 473, subdivision (b), motion.

NASSCO's Motion for Summary Judgment. On February 7, NASSCO filed a motion for summary judgment. NASSCO argued that it was not, as a matter of law, a joint employer of the class members on the day of safety training. Alternatively, NASSCO argued direct estoppel based on the summary judgment for J&M applied to preclude Peña from asserting the safety training time was compensable under the Labor Code. Peña opposed the motion, arguing there are triable issues of fact on the question whether NASSCO was a joint employer of the class members and also arguing direct estoppel did not apply to preclude his claim. On July 27, the trial court issued an order

granting NASSCO's motion for summary judgment and then entered judgment for NASSCO.

On October 3, Peña filed a notice of appeal challenging both the summary judgment for NASSCO and the order denying his section 473, subdivision (b), motion to vacate the summary judgment for J&M.

DISCUSSION

I

J&M's Motion to Dismiss the Appeal

On November 5, 2007, J&M filed a motion to dismiss Peña's appeal of the order denying his section 473, subdivision (b), motion to vacate the summary judgment in its favor. Peña filed opposition papers to J&M's motion to dismiss. On November 28, we issued an order stating J&M's motion to dismiss would be considered with the appeal.

J&M argues Peña's appeal of the order denying his section 473 motion should be dismissed because his notice of appeal was not timely filed within 60 days of the date it served notice on Peña's counsel of that order, as required under California Rules of Court, rule 8.104(a).[3] Rule 8.104(a) generally provides:

> "[A] notice of appeal must be filed on or before the earliest of:
>
> "(1) 60 days after the superior court clerk mails the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, showing the date either was mailed;
>
> "(2) *60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of*

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3 All rule references are to the California Rules of Court.

> *judgment or a file-stamped copy of the judgment*, accompanied by proof of service; or
>
> "(3) 180 days after entry of judgment." (Italics added.)

In support of its motion to dismiss, J&M attached a copy of its proof of service by mail stating that on May 31 it served on Peña's counsel a file-stamped copy of the trial court's order denying Peña's section 473 motion. That proof of service showed Patricia S. Donnelly, on behalf of J&M, mailed that file-stamped copy of the order to Peña's counsel at: "13418 Ventura Boulevard, Sherman Oaks, CA 91423." J&M argues Peña's notice of appeal of that order should have been filed no later than 60 days after that date (i.e., by July 30). Because Peña's notice of appeal was not filed until October 3, J&M argues his appeal should be dismissed as untimely.

However, Peña argues J&M's service by mail was ineffective for purposes of rule 8.104(a)(2) because it was *not* mailed to the office address last listed by his counsel on a document filed and served in this case as required by section 1013. Section 1013, subdivision (a), provides:

> "In case of service by mail, the notice or other paper shall be deposited in a post office, mailbox, . . . or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, *at the office address as last given by that person on any document filed in the cause and served on the party making service by mail*; otherwise at that party's place of residence. . . ." (Italics added.)

Peña attached to his opposition the declaration of his counsel, Marcus Jackson, in which he states his business address "is and at all times has been 1550 Hotel Circle Avenue North, Suite 170[,] San Diego, CA 92108." Jackson attached to his declaration a copy of

the cover page of Peña's sixth amended complaint showing the San Diego address as his office address and a copy of the November 20, 2006, proof of service on J&M of that complaint (which proof of service also stated his business address was at 1550 Hotel Circle Avenue North, Suite 170, San Diego, CA 92108). He also attached to his declaration a copy of the trial court's order granting Peña's motion for class certification and a copy of the January 31, 2007, proof of service on J&M of that order (which proof of service also stated his business address was at 1550 Hotel Circle Avenue North, Suite 170, San Diego, CA 92108). Jackson also attached a copy of a letter dated May 4, 2007, from J&M's counsel to him enclosing a proposed order denying Peña's section 473 motion. That letter was addressed to him at 1550 Hotel Circle Avenue North, Suite 170, San Diego, CA 92108.

Based on the record, we conclude J&M has not shown the shorter 60-day period of rule 8.104(a)(2) applies to bar Peña's notice of appeal filed on October 3, 2007. J&M has not shown it served a file-stamped copy of the trial court's order denying Peña's section 473 motion on his counsel "*at the office address as last given by that person on any document filed in the cause and served on the party making service by mail*," as required by section 1013, subdivision (a). (Italics added.) Peña's counsel submitted a January 31, 2007, proof of service of a copy of the trial court's order granting Peña's motion for class certification (which proof of service stated his business address was at 1550 Hotel Circle Avenue North, Suite 170, San Diego, CA 92108). The proof of service on J&M's counsel of that reply memorandum stated the business address of Peña's counsel was at 1550 Hotel Circle Avenue North, Suite 170, San Diego, CA 92108. Therefore, when on

May 31 J&M served a file-stamped copy of the trial court's order denying Peña's section 473 motion at a Sherman Oaks address for Peña's counsel, it did *not* comply with section 1013's requirement for service by mail. J&M does not show Peña filed and served on it any document in the case after the April 20, 2007, reply memorandum (or that any such document showed the Sherman Oaks address rather than the San Diego address for his counsel). We are not persuaded by J&M's argument that Peña waived the protections of section 1013 by not filing a rule 2.200 change of address when his counsel purportedly changed his office address to San Diego or by accepting service at the Sherman Oaks address of documents filed in this appeal. Finally, J&M does not persuade us Peña is required to show prejudice resulted from its deficient service (i.e., his counsel did not *actually* receive the file-stamped copy of the trial court's order denying his section 473 motion). Because Peña's notice of appeal was timely filed within 180 days after the order denying his section 473 motion, we conclude it was timely filed. (Rule 8.104(a)(3).) Accordingly, we deny J&M's motion to dismiss Peña's appeal. (Cf. *Lee v. Placer Title Co.* (1994) 28 Cal.App.4th 503, 511 ["strict compliance with statutory provisions for service by mail [i.e., § 1013, subd. (a)] is required"]; *Moghaddam v. Bone* (2006) 142 Cal.App.4th 283, 288 ["[n]otice of an appealable judgment or order mailed to an incorrect address is not sufficient to constitute legal notice"].)

II

Order Denying Peña's Section 473, Subdivision (b), Motion for Mandatory Relief

Peña contends the trial court erred by denying his section 473, subdivision (b),[4] motion to vacate the summary judgment in J&M's favor.

A

After the trial court granted J&M's motion for summary judgment and entered judgment in its favor, Peña filed a section 473(b) motion to vacate that summary judgment. He attached a declaration of Jackson, his counsel, in which Jackson stated he mistakenly and inadvertently filed untimely papers requesting a continuance of the hearing on J&M's summary judgment motion, and untimely filed Peña's opposition to that motion. J&M opposed Peña's section 473(b) motion, arguing section 473(b)'s mandatory relief provisions are inapplicable to mistakes involving summary judgment proceedings. The trial court denied Peña's section 473(b) motion.

B

Section 473(b) provides for either discretionary or mandatory relief in certain cases of mistake, inadvertence, surprise, or neglect:

> "*The court may*, upon any terms as may be just, relieve a party or his or her legal representative from *a judgment, dismissal, order, or other proceeding taken against him or her* through his or her mistake, inadvertence, surprise, or excusable neglect. . . . Notwithstanding any other requirements of this section, *the court shall*, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is

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4 For brevity, we hereafter refer to section 473, subdivision (b), as section 473(b).

> accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, *vacate any* (1) resulting *default* entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting *default judgment or dismissal* entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties. . . ." (Italics added.)

The mandatory relief provision of section 473(b) applies only to defaults, default judgments, and dismissals within the meaning of the statute. In providing for mandatory relief, "the Legislature created a *narrow* exception to the discretionary relief provision for default judgments and dismissals. [Citation.]" (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257, italics added.)

In the context of summary judgments, as the parties note, "there is a split of authority on whether the mandatory provisions of section 473(b) 'can provide relief from an order granting summary judgment.' [Citation.] At least one case allowed statutory relief in this context, *Avila v. Chua* (1997) 57 Cal.App.4th 860, 868 [67 Cal.Rptr.2d 373] [(*Avila*)]. Other cases have rejected that view, declining to extend the mandatory provisions to the summary judgment context. (See, e.g., *Prieto v. Loyola Marymount University* (2005) 132 Cal.App.4th 290, 294 [33 Cal.Rptr.2d 639] [(*Prieto*)] [failure to oppose summary judgment motion]; *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 681 [68 Cal.Rptr.2d 228] [defective opposition to summary judgment motion].)" (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1415 (*Huh*).) The determination whether section 473(b)'s mandatory provision applies to summary judgments requires statutory construction, which is a question of law we review de novo. (*Huh*, at p. 1418.)

Avila

In *Avila*, the plaintiff's opposition to the defendants' motions for summary judgment was untimely filed and the trial court thereafter denied the plaintiff's request for a continuance of the hearing on the motions. (*Avila*, *supra*, 57 Cal.App.4th at p. 864.) At the hearing, the trial court struck the plaintiff's opposition as untimely and granted the defendants' motions for summary judgment. (*Ibid*.) The plaintiff filed a section 473 motion to vacate the summary judgment, attaching an affidavit of his counsel who declared she made a mistake in calendaring the due date for the plaintiff's opposition to the summary judgment motion. (*Avila*, at p. 865.) The trial court denied the section 473 motion. (*Avila*, at p. 865.) On appeal, *Avila* concluded that section 473's mandatory relief provision applied in those circumstances. (*Avila*, at p. 867.) *Avila* reasoned that there had been no litigation and adjudication on the merits of the case and therefore the plaintiff had "lost his day in court due solely to his lawyer's failure to timely act." (*Id*. at p. 868.) *Avila* stated:

> "This case is directly *analogous to a default judgment*: Due to counsel's late filing of crucial documents, the court decided the matter on the other parties' pleadings. *There was no litigation on the merits*. [The plaintiff] submitted declarations which directly contradicted [the defendants'] most crucial proposed undisputed facts, but those declarations were not considered by the court. [The plaintiff's] response was stricken, and the matter proceeded to summary judgment and judgment as if by default." (*Id*. at p. 868, italics added.)

Avila noted the purpose of the mandatory relief provision is to relieve innocent clients from the burden of their attorneys' mistakes. (*Id*. at p. 868.) Also, it noted the law strongly favors disposition of cases on their merits and any doubts regarding application

of section 473 should be resolved in the moving party's favor. (*Avila*, at p. 868.) *Avila* reversed the order denying the section 473 motion and the order granting the summary judgment. (*Avila*, at pp. 869-870.)

English v. IKON Business Solutions, Inc.

English v. IKON Business Solutions, Inc. (2001) 94 Cal.App.4th 130 (*English*) was the second reported case to address the question whether the mandatory relief provisions of section 473(b) apply in the context of summary judgment motions. Rather than basing its interpretation of section 473(b) on policy grounds and analogies to default judgments as *Avila* primarily did, *English* extensively discussed the legislative history of section 473(b) in its construction of the statutory language "default," "default judgment," and "dismissal." (*English*, at pp. 138-140.) *English* noted the mandatory relief provision of section 473 was added in 1988 and then provided for relief only from a "default judgment." (*English*, at p. 138.) In 1991, the Legislature amended section 473 to also provide for mandatory relief from defaults (in addition to default judgments). (*English*, at p. 139.) In 1992, the Legislature again amended section 473 to provide for mandatory relief from dismissals (in addition to defaults and default judgments). (*English*, at p. 140.) *English* explained:

> "In 1992, at the urging of the State Bar, the Legislature once again amended section 473(b), this time to give plaintiffs some of the mandatory relief that had been available to defendants since the 1988 amendment. [Citations.] The impetus behind this change was the State Bar's conclusion ' "that it is illogical and arbitrary to allow mandatory relief for defendants when a default judgment has been entered against them due to defense counsel's mistakes and to not provide comparable relief to plaintiffs whose cases are dismissed for the same reason." ' [Citations.] By inserting the word 'dismissal' into the mandatory provision of the statute, the Legislature now

> required the courts to vacate any 'resulting default' or 'resulting default judgment or dismissal' when the other requirements of the mandatory provision were met." (*English*, *supra*, 94 Cal.App.4th at p. 140, fn. omitted.)

English disagreed with *Avila*'s construction of section 473's mandatory relief provision to include summary judgments, noting *Avila* did not review in detail the history and development of that provision. (*English*, at p. 142.) *English* stated the words "default" and "default judgment" generally apply when a defendant fails to appear or file an answer to a complaint. (*Id*. at pp. 143-144.) Because a "summary judgment does not result from a defendant's failure to answer the complaint," *English* concluded "a summary judgment is neither a 'default' nor a 'default judgment' within the meaning of the mandatory provision of section 473(b)." (*Id.* at p. 144.) *English* disagreed with "the *Avila* court's conclusion that a summary judgment is 'directly analogous to a default judgment' when the opposing party fails to file a timely opposition to the motion . . . ." (*Id.* at p. 144.) Furthermore, *English* stated: "It is not an appellate court's task, nor, indeed, its prerogative, when interpreting a statute, to extend the scope of the statute to encompass situations 'analogous' to those the statute explicitly addresses." (*Ibid*.) *English* criticized other courts' "expansive interpretation of the statute under which the dispositive test, largely detached from the language of the statute itself, is whether the ruling from which relief is sought was 'in the nature of a default' and whether the party seeking relief 'had her day in court.' " (*Id*. at pp. 147-148.)

Addressing the word "dismissal" in the context of section 473(b)'s mandatory provision, *English* noted " 'a dismissal is the withdrawal of an application for judicial relief by the party seeking such relief, or the removal of the application by a court.'

[Citation.]" (*English, supra*, 94 Cal.App.4th at p. 144, quoting *Yeap v. Leake* (1997) 60 Cal.App.4th 591, 603 (dis. opn. of Epstein, J.).) In particular, "[a]lthough . . . section 581 describes various circumstances in which an action may be dismissed, either by the court or by a party, noticeably lacking is any provision describing a summary judgment in favor of a defendant as a 'dismissal.' " (*English*, at pp. 144-145.) Furthermore, construing the word "dismissal" in the context of section 473(b)'s language, *English* concluded the word "dismissal" has "a *limited* meaning similar to the term 'default judgment.' " (*English*, at p. 145, italics added.) Because the purpose of the 1992 amendment to section 473 was to give plaintiffs the functional equivalent of the default provision for defendants, "a plaintiff would be entitled to mandatory relief from a 'dismissal' resulting from similar circumstances" to that which a defendant would be entitled regarding a default or default judgment. (*English*, at p. 145.) Accordingly, the *English* court noted it had previously "held that the mandatory provision does not apply to: (1) a dismissal following the sustaining of a demurrer without leave to amend on the ground the statute of limitations had run [citation]; (2) a voluntary dismissal pursuant to a settlement agreement [citation]; and (3) a mandatory dismissal for failure to serve a complaint within three years [citation]." (*Id*. at p. 146.) *English* agreed with Justice Epstein's statement: " '[T]o read the mandatory provision of . . . section 473 to apply whenever a party loses his or her day in court due to attorney error goes far beyond anything the Legislature has done.' [Citation.]" (*English*, at p. 148, quoting *Yeap v. Leake, supra*, 60 Cal.App.4th at p. 605 (dis. opn. of Epstein, J.).) *English* concluded:

> "Given the limited meaning of the word 'dismissal' as used in the mandatory provision of section 473(b), a summary judgment in

> favor of a defendant is not a 'dismissal.' A summary judgment is not 'the removal . . . by a court' 'of an application for judicial relief.' [Citation.] Rather, it is a judicial determination that under the undisputed facts before the court, the moving party is entitled to prevail in the action as a matter of law. [Citation.] It is true the summary judgment statute allows a court to grant summary judgment if the opposing party fails to file a separate statement of disputed and undisputed material facts. [Citation.] Even in that situation, however, the court cannot grant the motion 'until it has considered all of the papers and determined no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law.' [Citation.] Thus, a summary judgment in favor of a defendant does not constitute a removal of the plaintiff's application for judicial relief, but rather an adjudication of that application based on the undisputed facts before the court. [¶] As used in the mandatory provision of section 473(b), the word 'dismissal' cannot reasonably be construed to encompass a judgment to which a court has determined the defendant is entitled as a matter of law based on undisputed facts before the court. Consequently, we conclude a summary judgment is not a 'dismissal' within the meaning of section 473(b)." (*English*, *supra*, 94 Cal.App.4th at pp. 148-149.)

English stated its construction of section 473(b) "furthers the legislative goal behind the 1992 amendment of putting defendants and plaintiffs on equal footing in their entitlement to mandatory relief under the statute. Under no circumstances can the term 'default judgment,' as we have interpreted that term, be deemed to encompass a summary judgment entered in favor of a plaintiff. By rigorously adhering to the statutory language, to the principles of statutory construction, and to the (by now) well-known legislative purpose behind the 1992 amendment, we carry out the Legislature's intent by ensuring neither party is entitled to a greater measure of relief than the other under the mandatory provision of section 473(b) in the summary judgment context." (*English*, at p. 149.) Therefore, *English* concluded: "Because a summary judgment is neither a 'default,' nor a 'default judgment,' nor a 'dismissal' within the meaning of section 473(b), the trial court

properly denied English's motion to vacate the summary judgment in favor of IKON." (*Id.* at p. 149.)

Prieto

The third reported case to address the instant question was *Prieto*, *supra*, 132 Cal.App.4th 290. *Prieto* agreed with *English*'s reasoning and was unpersuaded by *Avila*'s reasoning. (*Prieto*, at pp. 295-297.) *Prieto* further noted "the general rule that the client is chargeable with the negligence of his or her attorney" supports a narrow interpretation of section 473(b)'s mandatory relief provision. (*Prieto*, at p. 296.) *Prieto* adopted *English*'s narrow interpretation of section 473(b)'s mandatory relief provision, stating: "*English* is the better view." (*Prieto*, at p. 297.)

Huh

The fourth reported case to address the instant question was *Huh*, *supra*, 158 Cal.App.4th 1406. After summarizing the court's reasoning in *English*, *Huh* stated it "agree[s] with the cogent analysis in *English*, which is faithful to legislative intent and consistent with established principles of statutory construction." (*Id*. at p. 1417.) *Huh* stated:

> "[W]e agree with the *English* court's narrow construction of the mandatory portion of section 473(b). [Citation.] As *English* and its progeny recognize, the mandatory provision 'applies only to relief sought in response to defaults, default judgments or dismissals.' [Citation.] Summary judgments thus are not within the purview of the mandatory relief provision. [Citations.]" (*Huh*, *supra*, 158 Cal.App.4th at p. 1418.)

Huh concluded: "Since appellant sought to set aside a summary judgment, his case offers no basis for mandatory statutory relief and the trial court did not err in refusing it." (*Ibid*.)

C

Peña asserts we should adopt the court's reasoning in *Avila* as more persuasive than the contrary authority of and reasoning in *English*, *Prieto* and *Huh,* and therefore concludes section 473(b)'s mandatory relief provision applies to summary judgments. J&M argues we should reach a contrary conclusion, as the trial court did in this case.

After considering the reasoning in *English* and its progeny and comparing it to the reasoning in *Avila*, we conclude *English*'s reasoning is more persuasive and true to the statutory language and legislative intent of section 473(b), including its 1992 amendment. Because in this case the trial court granted defendant J&M's motion for summary judgment, neither a "default" nor a "default judgment" under section 473(b) is involved as those actions generally are taken only when a defendant does not appear or file an answer to a complaint. (*English*, *supra*, 94 Cal.App.4th at pp. 143-144.) Therefore, that leaves plaintiff Peña with only a "dismissal" as a possible means of mandatory relief under section 473(b) to vacate the summary judgment based on his attorney's purported mistake in belatedly requesting a continuance of the hearing and/or untimely filing the opposition to J&M's motion for summary judgment.

However, as *English* concluded, a summary judgment is *not* a "dismissal" for purposes of that mandatory relief provision. (*English*, *supra*, 94 Cal.App.4th at pp. 148-149.) Narrowly interpreting "dismissal" under section 473(b), "a dismissal is the

withdrawal of an application for judicial relief by the party seeking such relief, or the removal of the application by a court." (*English*, at p. 144.) Summary judgment is neither of those actions, but is instead a judicial determination of the merits of a case based on undisputed facts.[5] (*English, supra,* 94 Cal.App.4th at pp. 148-149.) Furthermore, although section 473(b) provides for mandatory relief for "dismissals," that term has *not* been construed broadly to include all "dismissals" under section 581 or otherwise. (*English*, at p. 146; *Matera v. McLeod* (2006) 145 Cal.App.4th 44, 65 ["[C]ourts have rejected a literal construction of the term 'dismissal' in the mandatory relief provision as inconsistent with the apparent purpose of the statute."].) "[W]hen the Legislature incorporated dismissals into section 473 it intended to reach only those dismissals which occur through failure to oppose a dismissal motion--the only dismissals which are procedurally equivalent to a default. [Citations.]" (*Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809, 1817.) Because the mandatory relief provisions of section 473(b) do not include relief for mistakes made by an attorney in opposing, or not opposing, a summary judgment motion (or not timely requesting a continuance of a hearing on a summary judgment motion), we conclude the trial court did not err by denying Peña's section 473(b) motion to vacate the order granting J&M's motion for summary judgment or the summary judgment entered in J&M's favor.[6]

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[5] As *English* noted, a summary judgment is *not* included in the list of types of dismissals under section 581. (*English, supra,* 94 Cal.App.4th at pp. 144-145.)

[6] Because we affirm the summary judgment for J&M on that ground, we need not, and do not, address J&M's alternative assertion that Jackson's declaration was insufficient to support Peña's motion for mandatory relief under section 473(b).

III

NASSCO's Liability as a Joint Employer of the Class Members

Peña contends the trial court erred by granting NASSCO's motion for summary judgment because there are triable issues of material fact on whether NASSCO was a joint employer of Peña and the other members of the class.

A

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citations.]" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

Aguilar clarified the standards that apply to summary judgment motions under section 437c. (*Aguilar, supra,* 25 Cal.4th at pp. 843-857.) Generally, if all the papers submitted by the parties show there is no triable issue of material fact and the " 'moving party is entitled to a judgment as a matter of law' " (§ 437c, subd. (c)), the court must grant the motion for summary judgment. (*Aguilar,* at p. 843.) Section 437c, subdivision (p)(2), states:

> "A defendant . . . has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that

> cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto."

Aguilar made the following observations:

> "First, and generally, from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. . . . There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. . . .
>
> "Second, and generally, the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question. . . .
>
> "Third, and generally, how the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on *which* would bear *what* burden of proof at trial. . . . [I]f a defendant moves for summary judgment against . . . a plaintiff [who would bear the burden of proof by a preponderance of the evidence at trial], [the defendant] must present evidence that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not--otherwise, *he* would not be entitled to judgment *as a matter of law*, but would have to present *his* evidence to a trier of fact." (*Aguilar*, *supra*, 25 Cal.4th at pp. 850-851, fns. omitted.)

Aguilar stated:

> "To speak broadly, all of the foregoing discussion of summary judgment law in this state, like that of its federal counterpart, may be

> reduced to, and justified by, a single proposition: *If a party moving for summary judgment in any action . . . would prevail at trial without submission of any issue of material fact to a trier of fact for determination, then he should prevail on summary judgment.* In such a case, . . . the 'court should grant' the motion 'and avoid a . . . trial' rendered 'useless' by nonsuit or directed verdict or similar device. [Citations.]" (*Aguilar*, *supra*, 25 Cal.4th at p. 855, italics added.)

"[E]ven though the court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact, it must nevertheless determine what any evidence or inference *could show or imply to a reasonable trier of fact*. . . . In so doing, it does not decide on any finding of its own, but simply decides what finding such a trier of fact could make for itself. [Citations.]" (*Aguilar*, *supra*, 25 Cal.4th at p. 856.) "[I]f the court determines that all of the evidence presented by the plaintiff, and all of the inferences drawn therefrom, show and imply [the ultimate fact] *only as likely as* [not] *or even less likely*, it must then grant the defendants' motion for summary judgment, even apart from any evidence presented by the defendants or any inferences drawn therefrom, because a reasonable trier of fact could not find for the plaintiff. Under such circumstances, the [factual] issue is not triable--that is, it may not be submitted to a trier of fact for determination in favor of either the plaintiff or the defendants, but must be taken from the trier of fact and resolved by the court itself in the defendants' favor and against the plaintiff." (*Id*. at p. 857, fn. omitted.)

"On appeal, we exercise 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.' [Citation.] 'The appellate court must examine only papers

before the trial court when it considered the motion, and not documents filed later. [Citation.] Moreover, we construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it.' [Citations.]" (*Seo v. All-Makes Overhead Doors* (2002) 97 Cal.App.4th 1193, 1201-1202.)

B

In moving for summary judgment, NASSCO argued it was not, as a matter of law, a joint employer of the class members on the day of safety training. In support of its motion, NASSCO submitted a separate statement of undisputed material facts. Peña opposed the motion, arguing there are triable issues of fact on the question whether NASSCO was a joint employer of the class members. In support of his opposition, Peña submitted his opposition to NASSCO's separate statement of material undisputed facts and also submitted his own separate statement of additional undisputed material facts. In granting NASSCO's motion for summary judgment, the trial court stated:

> "After full consideration of the evidence and supporting papers of each party, as well as oral argument, the Court finds that . . . there is no triable issue of material fact in this action with respect to any of the causes of action pleaded against NASSCO by [Peña] and the Class he represents (collectively, 'Plaintiffs') in the Complaint herein . . . . [¶] . . .[¶]
>
> "The parties agree upon the overall criteria courts are to consider in determining whether an employer can be considered a joint employer for purposes of liability issues. Courts are to consider the 'totality of the circumstances that reflect upon the nature of the work relationship of the parties, with emphasis upon the extent to which the defendant controls the plaintiff[']s performance of employment duties. There is no magic formula for determining whether an organization is a joint employer. Rather, the court must analyze myriad facts surrounding the employment relationship in question.

> No one factor is decisive. [T]he precise contours of an employment relationship can only be established by a careful factual inquiry.' [(*Vernon v. State of California* (2004) 116 Cal.App.4th 114, 124-125.)]
>
> "The Court finds that NASSCO has met its burden with respect to the issue of joint employer status, and it has established that it is not Plaintiffs' employer directly or indirectly. This is based on the unchallenged evidence presented by NASSCO. (*See, e.g.*, Breece Declaration and exhibits thereto.) Plaintiffs have failed to provide sufficient evidence to raise a triable issue of material fact on that point. More specifically, Plaintiffs have failed to show 'a sufficient indicia of an interrelationship . . . to justify the belief on the part of [Plaintiffs] that the [alleged co-employer] is jointly responsible for the acts of the immediate employer.' [(*Vernon, supra*, 116 Cal.App.4th at p. 126.)] The Court grants the motion on that ground alone."

The trial court entered judgment for NASSCO.

C

Peña asserts there is a triable issue of material fact whether NASSCO was a joint employer (together with J&M as the direct employer) of the members of the represented class of employees not paid for attending the one-day safety training course. In effect, he argues, based on the parties' summary judgment papers, a court cannot decide as a matter of law that NASSCO was not a joint employer and therefore entitled to judgment. Peña does not dispute that if NASSCO was not a joint employer of the represented class members as a matter of law, it cannot be held liable on any of the operative complaint's causes of action.

The parties apparently agree *Vernon v. State of California*, *supra*, 116 Cal.App.4th 114 (*Vernon*) sets forth the "totality of circumstances" test for determining whether a defendant is a joint employer of an employee under California law.[7] *Vernon* stated:

> "The various designated tests adopted by the courts to determine the existence of an employer/employee relationship have articulated many of the same or similar governing standards, and have ' "little discernable difference" ' between them. [Citations.] The common and prevailing principle espoused in all of the tests directs us to consider the 'totality of circumstances' that reflect upon the nature of the work relationship of the parties, with emphasis upon the extent to which the defendant controls the plaintiff's performance of employment duties. [Citations.] 'There is no magic formula for determining whether an organization is a joint employer. Rather, the court must analyze "myriad facts surrounding the employment relationship in question." [Citation.] No one factor is decisive. [Citation.]' [Citations.]" (*Vernon*, *supra*, 116 Cal.App.4th at pp. 124-125, fn. omitted.)

Vernon then described the various factors courts should consider in applying that "totality of circumstances" test for joint employer status:

> "Factors to be taken into account in assessing the relationship of the parties include payment of salary or other employment benefits and Social Security taxes, the ownership of the equipment necessary to performance of the job, the location where the work is performed, the obligation of the defendant to train the employee, the authority of the defendant to hire, transfer, promote, discipline or discharge the employee, the authority to establish work schedules and assignments, the defendant's discretion to determine the amount of compensation earned by the employee, the skill required of the work performed and the extent to which it is done under the direction of a supervisor, whether the work is part of the defendants' regular

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7 Although NASSCO appears to alternatively propose that we apply the federal "totality of circumstances" test for determining whether it was a joint employer, we apply the California test because it appears to be more favorable to employees. (See generally *Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, 34 ["federal law does not control unless it is more beneficial to employees than the state law"].)

> business operations, the skill required in the particular occupation, the duration of the relationship of the parties, and the duration of the plaintiff's employment. [Citations.] ' "Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." [Citation.]' [Citation.]
>
> " 'Of these factors, the extent of the defendant's right to control the means and manner of the workers' performance is the most important.' [Citations.] In all cases, an 'employer must be an individual or entity who extends a certain degree of control over the plaintiff.' [Citation.] . . . Further, 'the control an organization asserts must be "significant," [citation], and there must be a "sufficient indicia of an interrelationship . . . to justify the belief on the part of an aggrieved employee that the [alleged co-employer] is jointly responsible for the acts of the immediate employer." [Citations.]' [Citations.]" (*Vernon*, *supra*, 116 Cal.App.4th at pp. 125-126.)

Although the parties generally agree on the applicable "totality of circumstances" test for determining whether NASSCO was a joint employer, they disagree on the temporal element in applying that test. Because the represented class consists of J&M employees not paid for their time spent during the one day of safety training, NASSCO argues application of the "totality of circumstances" test in this case should involve consideration of evidence that relates only to the period up to and including the day of training. Peña disagrees, arguing the application of the "totality of circumstances" test should not have that temporal limitation and a court should consider all evidence of the parties' working relationship, including evidence relating to the period after the day of training. Neither party has cited, and we are not aware of, any case discussing any temporal limitation on the evidence that may be considered in making a joint employer determination.

However, applying general principles of relevancy, we conclude that in the circumstances of this class action, the evidence to be considered must relate to the period up to and including the day of safety training. The certified class consists of "[a]ll persons hired by [J&M] to perform work for NASSCO within the State of California who have undergone NASSCO's mandatory safety orientation or training and were not paid for the time spent in that safety orientation or training." The represented class does not consist of those persons who were hired, attended the one-day safety training course, *and* then performed work on NASSCO projects.

Because a working relationship between a defendant and an employee is dynamic and may change over time depending on the circumstances of their working relationship, a specific time period must be selected for the determination whether the defendant is a joint employer during that period. By requesting and obtaining certification of the class as defined above, Peña has limited the period during which he has alleged NASSCO was a joint employer of the represented class members (i.e., up to and including the one-day safety training course). He does *not* seek any relief for alleged employees of NASSCO during the period they may have performed actual work on NASSCO projects after that one-day training course. Therefore, the relevant time period for determination of whether the class members were employees of NASSCO, as a joint employer, begins on their recruitment and hiring and ends on completion of the one-day training course.[8]

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[8] To the extent Peña argues a court should also consider the working relationship of the class members after they completed the training course and began working on NASSCO projects, not only would that be inconsistent with the definition of the certified class, but it would also lead to specific factual issues regarding each member's working

Nevertheless, after considering the evidence relevant to that time period and determining whether there is a triable issue on the question whether NASSCO was a joint employer, we briefly consider evidence relating to the posttraining day period to ensure our temporal limitation of the evidence does not lead to an unjust result.

Applying the *Vernon* "totality of circumstances" test to the parties' summary judgment evidence relating to the period up to and including the one-day safety training course, we conclude that no reasonable trier of fact, considering that evidence and making all reasonable inferences from that evidence in Peña's favor, could conclude NASSCO was a joint employer of the represented class members. (*Aguilar*, *supra*, 25 Cal.4th at pp. 856-857.) One *Vernon* factor is the payment of salary or other employment benefits and Social Security taxes. (*Vernon*, *supra*, 116 Cal.App.4th at p. 125.) The undisputed evidence in this case shows J&M (and not NASSCO) paid the salary and benefits (and presumably related employer taxes) of the class members. Another *Vernon* factor is the ownership of the equipment necessary to performance of the job. (*Ibid*.) However, because none of the class members performed any actual work on NASSCO projects before completion of the one-day safety training course, ownership of equipment required to perform that work is irrelevant to the joint employer determination during the relevant time period in this case.

Another *Vernon* factor is the location where the work is performed. (*Vernon, supra,* 116 Cal.App.4th at p. 125.) Again, because none of the class members performed

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relationship with NASSCO that would weigh against certification of Peña's action as a class action.

any actual work on NASSCO projects before completion of the one-day safety training course, the location of that work is irrelevant to the joint employer determination during the relevant time period in this case. In any event, to the extent the one-day safety training course was conducted in NASSCO offices, that factor minimally, if at all, weighs in favor of joint employer status for NASSCO. Another *Vernon* factor is the obligation of NASSCO to train the employee. (*Ibid*.) However, NASSCO had no *obligation* to train any of the class members. It was not required to present the safety training to the class members. Rather, NASSCO made safety training a precondition to allowing persons to work on NASSCO projects. It was J&M that required the class members to attend the NASSCO safety training course. A J&M coordinator generally escorted class members to the safety training course and picked them up after the course was concluded. Although Peña argues NASSCO circulated an attendance sheet at the one-day safety course and distributed a test at the end of the course, those actions do not show NASSCO required the class members to attend the course. Furthermore, the training provided was general safety information not specific to the actual work to be subsequently performed by the class members.

Another *Vernon* factor is the authority of NASSCO to hire, transfer, promote, discipline or discharge the employee. (*Vernon*, *supra*, 116 Cal.App.4th at p. 125.) That factor, although listed in the middle of the *Vernon* factors, is an extremely important one in the determination of whether a defendant is a joint employer.[9] The undisputed

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[9] Had *Vernon* listed the various factors in order of relative importance in a joint employer determination, a defendant's authority to hire, transfer, promote, discipline or

evidence in this case shows *J&M* (and not NASSCO) recruited and hired Peña and the other class members. In opposing NASSCO's motion for summary judgment, Peña did not dispute NASSCO's separate statement of undisputed material fact that stated: "The agreement between NASSCO and J&M provided that J&M would have complete control over and be solely responsible for the entire hiring process for the laborers it provided to NASSCO." Peña also did not dispute NASSCO's separate statement of undisputed material fact that stated: "J&M's hiring process also includes: (i) recruiting and screening its applicants; (ii) providing (or reimbursing for) transportation to San Diego for its employees; (iii) arranging for lodging and transportation in San Diego for its employees; (iv) verifying their eligibility to work in the United States; and (v) having its employees fill out all employment-related paperwork." The undisputed evidence in this case also shows *J&M* disciplined and/or discharged Peña and the other class members. NASSCO's separate statement of undisputed material facts asserted:

> "20. If a J&M worker fails to attend the safety training course or leaves before it is completed, the NASSCO safety representatives take no action against the J&M employee. If directed by J&M, such workers may attend another safety training course at another time.
>
> "21. Disciplinary issues, if any, that occur during safety training with respect to J&M employees are turned over to the J&M coordinators. The only action taken by the NASSCO safety representatives when confronted with such an issue is to refer the J&M employee to their J&M coordinator and to make a note if the individual does not complete the training."

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discharge the employee likely would have been listed first as the most important factor in determining the right of control over the employee and the working relationship.

Although in opposition to that separate statement Peña asserted those facts were "disputed," he disagrees with NASSCO's statement only to the extent that NASSCO takes attendance and circulates a test at the end of the safety course. However, based on the record in this case, it cannot be reasonably inferred from the evidence that either NASSCO's recordation of attendance or its distribution of a test constitutes discipline of the class members. Rather, as NASSCO states, it merely reports to J&M whether one of J&M's employees was absent or departed early from the one-day safety course. NASSCO does not take any disciplinary or other action against that J&M employee. Accordingly, Peña's purported "dispute" of NASSCO's separate statement does not support a reasonable inference NASSCO had any right or authority to discipline or discharge a J&M employee. Therefore, we conclude the evidence is undisputed NASSCO had no authority to hire, transfer, promote, discipline or discharge the class members. (*Vernon*, *supra*, 116 Cal.App.4th at p. 125.)

Another *Vernon* factor is the defendant's authority to establish work schedules and assignments. (*Vernon*, *supra*, 116 Cal.App.4th at p. 125.) Because of the temporal limitation discussed above, we consider only the evidence relating to the day of the safety training. The undisputed evidence shows J&M (and not NASSCO) chose (i.e., scheduled) the day on which a J&M employee would attend the safety course. Peña does not dispute that the J&M coordinator directed the class members as to where and when to attend the safety course. Furthermore, Peña apparently does not dispute NASSCO's asserted statement of undisputed material fact that stated: "J&M directed Peña . . . to report to safety training the next day." Although NASSCO apparently instructed

attendees of its safety course not to leave the training area during breaks, they were allowed to leave the training area during lunch. Therefore, the evidence does not support a reasonable inference that NASSCO had the authority to establish work schedules and assignments. (*Ibid*.)

Another *Vernon* factor is the defendant's discretion to determine the amount of compensation earned by the employee. (*Vernon*, *supra*, 116 Cal.App.4th at p. 125.) It is undisputed that *J&M* (and not NASSCO) determined the amount of compensation the class members received. In opposing NASSCO's motion for summary judgment, Peña did not dispute NASSCO's separate statement of undisputed material fact that stated: "Issues regarding the contract laborer's [class member's] wages are, and always have been, handled exclusively by J&M." Peña also did not dispute NASSCO'S separate statement that he telephoned J&M's offices and spoke with a J&M representative who "informed him that the job paid an hourly rate as well as a per diem amount for working away from home." There is no evidence to support a reasonable inference NASSCO had discretion to determine the amount of compensation the class members received. As Peña notes, there is evidence NASSCO agreed to pay J&M an additional $1 per hour in the "burden rate" it paid J&M for work done by its contracted laborers, which additional compensation was intended to compensate J&M for paying J&M's employees for attending the one-day safety training course before beginning work on NASSCO's projects. However, NASSCO's payment of additional compensation to J&M does not support a reasonable inference that *NASSCO* determined the amount of compensation

received by the class members. Rather, J&M alone established the compensation they received.

Other *Vernon* factors include the skill required of the work performed and the extent to which that work is done under the direction of a supervisor. (*Vernon, supra*, 116 Cal.App.4th at p. 125.) Because of the temporal limitation discussed above, we consider only the evidence relating to the day of the safety training. However, because none of the class members performed any actual work on NASSCO projects before completion of the one-day safety training course, the skill required to perform the subsequent work and the supervision of that work are irrelevant to the joint employer determination during the relevant time period in this case. During the one-day safety training course, the class members simply attended the course and were not required to perform any work, much less work supervised by NASSCO. Although Peña ostensibly disputed NASSCO's assertion that he "performed no work for NASSCO during the safety training," his dispute was based only on his assertion that course attendees must be compensated for the time they could not freely leave the course site. That evidence, if true, nevertheless does not show NASSCO supervised any work done by the class members on the day of the safety training course.[10]

Another *Vernon* factor is whether the work is part of NASSCO's regular business operations. (*Vernon*, *supra*, 116 Cal.App.4th at p. 125.) Again, because of the temporal limitation discussed above, we consider only the evidence relating to the day of the safety

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10 Furthermore, Peña did not dispute NASSCO's asserted fact that he had no contact with NASSCO supervisors until after he completed the one-day safety training course.

training. However, because none of the class members performed any actual work on NASSCO projects before completion of the one-day safety training course, NASSCO's regular business operations (i.e., its construction and repair shipyard operations) are irrelevant to the joint employer determination during the relevant time period in this case.

Another *Vernon* factor is the skill required in the particular occupation of the class members. (*Vernon*, *supra*, 116 Cal.App.4th at p. 125.) However, because none of the class members performed any actual work on NASSCO projects before completion of the one-day safety training course, the skill required in their particular occupation (e.g., pipefitters) is irrelevant to the joint employer determination during the relevant time period in this case.

Finally, the remaining *Vernon* factors are the duration of the relationship of the parties and the duration of the class members' employment. (*Vernon*, *supra*, 116 Cal.App.4th at p. 125.) Because of the temporal limitation discussed above, we consider only the evidence relating to the day of the safety training. For purposes of this case, the duration of the relationship between NASSCO and the class members was very short, consisting of only one day of safety training.[11] Furthermore, for purposes of this case, the duration of the class members' employment was also very short (i.e., from the date of their respective hiring by J&M through the one day of safety training).

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11 To the extent Vernon intended the term "parties" to mean the purported joint employers, the multiple-year contractual relationship between NASSCO and J&M does not appear to weigh in favor of or against NASSCO's status as a joint employer.

Considering the parties' summary judgment evidence and making all reasonable inferences in Peña's favor, we conclude, as a matter of law, the above *Vernon* factors in the context of this case do not support a reasonable inference NASSCO was a joint employer of the class members. Alternatively stated, under the applicable "totality of circumstances" test, no trier of fact could reasonably conclude NASSCO was a joint employer of the class members. (*Aguilar*, *supra*, 25 Cal.4th at pp. 856-857.) Although in reviewing the trial court's order granting NASSCO's motion for summary judgment we do not weigh the parties' evidence or make any factual findings of our own, we "must nevertheless determine what any evidence or inference *could show or imply to a reasonable trier of fact*." (*Id*. at p. 856.) Because all of the evidence presented by Peña, and all of the inferences drawn from the evidence, show and imply NASSCO's joint employer status *only as likely as* its non-joint employer status *or even less likely*, we conclude the trial court properly granted NASSCO's motion for summary judgment, as a reasonable trier of fact could not find NASSCO liable to Peña's represented class as a joint employer. (*Id*. at p. 857.) Alternatively stated, considering Peña's evidence and all reasonable inferences from the evidence, a trier of fact could not reasonably conclude NASSCO had sufficient control over the means and manner of the class members' work on the day of the safety training and therefore could only reasonably conclude there was an insufficient working relationship between NASSCO and the class members to find NASSCO was a joint employer of the class members. (*Vernon*, *supra*, 116 Cal.App.4th at pp. 124-126.) Absent NASSCO's status as a joint employer of the class members, it

cannot be held liable on the causes of action alleged in Peña's sixth amended complaint (i.e., for unpaid wages and other Labor Code violations and for unfair competition).

Assuming arguendo, as discussed above, we should also consider evidence relating to the period beginning the day after the safety training, we nevertheless would conclude the parties' working relationship shows, as a matter of law, NASSCO was not a joint employer of the class members. Although we now consider that additional posttraining day evidence, we must nevertheless decide whether Peña has failed to show there is a triable issue of fact whether NASSCO was a joint employer of the class members *on the day of the safety training*. Peña's complaint does not seek any relief for the class members from NASSCO as a joint employer after that one day of safety training. Therefore, to the extent we consider evidence relating to the posttraining day period, it is relevant only on the issue of whether NASSCO was a joint employer of the class members on the day of the safety training. Without reevaluating each of the *Vernon* factors discussed above based on consideration of that additional evidence and reasonable inferences from the evidence, we focus on the few issues raised by Peña in this expanded factual context. Peña argues the evidence shows that after the class members completed the one-day safety training course, NASSCO assigned and supervised the work of the class members on NASSCO projects. However, although the evidence may support a reasonable inference NASSCO requested certain J&M employees to be assigned to work on certain NASSCO projects and generally supervised their work, the evidence does not

support a reasonable inference NASSCO had sufficient control over those employees to be considered their joint employer on the day of safety training.[12]

Peña also argues NASSCO had the authority to fire the class members from J&M's employment because J&M had no business activities other than providing temporary contract laborers to NASSCO. Peña's separate statement of additional undisputed material facts asserted: "NASSCO has the authority to fire the Class members because J&M currently has no other business activities other than providing labor to NASSCO, thus if an employee is fired by NASSCO [he or she is] fired from J&M[.]" NASSCO objected to that asserted fact, arguing the evidence did not support it. It argued J&M had control over hiring and firing of J&M employees and the fact J&M had no other clients was irrelevant to NASSCO's control over J&M employees. We conclude it cannot be reasonably inferred NASSCO had the authority to terminate the employment of a J&M employee when it merely requested that J&M discontinue that J&M employee's work on NASSCO projects. Although J&M's lack of other clients with which to place that discontinued J&M employee may, in fact, result in J&M's termination of that employee's employment, that evidence does not constitute sufficient legal or actual control by

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12 Peña did not dispute NASSCO's separate statement of undisputed material fact that stated: "After safety training concluded, the J&M coordinator escorted Peña and the other J&M contract laborers to the pipe shop at NASSCO, where they were told when and where to report the following morning." Also, in Peña's separate statement of additional undisputed material facts in opposition to NASSCO's motion for summary judgment, he asserted in pertinent part: "NASSCO gives out shipbuilding/repair job assignments and supervises the work of the Class members after they undergo training." NASSCO objected to that asserted fact, arguing it mischaracterized the evidence, which showed "NASSCO gives assignments to J&M and does not constantly supervise the work that J&M's employees are doing."

NASSCO over the J&M employee for NASSCO to be found a joint employer as the day of the safety training. Even after considering evidence relating to the period after the day of safety training, we reaffirm our conclusion that no trier of fact could reasonably conclude NASSCO was a joint employer of the class members as of the day of safety training. (*Aguilar, supra*, 25 Cal.4th at pp. 856-857.) Therefore, as we concluded above, the trial court properly granted NASSCO's motion for summary judgment.[13]

DISPOSITION

The order denying plaintiffs' section 473, subdivision (b), motion to vacate the summary judgment for defendant J&M is affirmed. The judgment for defendant NASSCO is affirmed. J&M and NASSCO are entitled to their costs on appeal.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.

13 Because we dispose of this issue on that ground, we need not, and do not, address NASSCO's alternative assertion that direct estoppel or issue preclusion applies to bar Peña's claims against it.